the by-laws) commences:— "no person shall erect or commence to erect any building etc." Again, by-laws 37, 40 and 45 fall under 'B' which is headed 'Plans'. This in itself is enough to show that the by-laws in question refer to the erection of buildings. An owner who is in possession of premises which he is not proposing to alter or re-erect, does not require to pass plans.

The case of *Municipal Commissioners v. Syed Abdulrahman bin Shaikh Alkaff & Ors.*, 6 M.L.J., page 183, decided last year by the Singapore Court of Appeal, has some bearing on the principles to be followed. In that case an owner was intending to effect some repairs and alterations to an old building which did not have a verandah way, and the Municipal Commissioners of Singapore refused to pass the plans unless such verandah way was established. They relied on one of the building by-laws No. 121 which reads:—

> "Every person who shall erect a building which abuts on any street or road shall provide a verandah way or an uncovered footway etc.,"

The question for the Court was whether the words 'erect a building' were used in the ordinary sense of 'erecting a new building' or whether the words covered the case of a person who was "deemed to erect a building", because he intended to effect certain repairs. The Court held that if the by-law in question was given the wider meaning contended for, it would be unreasonable and *ultra vires;* but that by-laws should be construed 'benevolently' (*Kruse v. Johnson*, 1898, 2 Q.B. at page 99), and where a by-law is capable of two constructions one of which will make it valid and the other invalid, it ought to receive that interpretation which will support it (per Lord Wensleydale in *R. v. Saddlers Co.*, 32 L.J., Q.B. page 337). Accordingly the by-law was held to apply only to new buildings and as such to be *intra vires*. If the by-law in question could be held to be *ultra vires* if applied to persons who were merely effecting repairs, as distinguished from persons erecting a new building, a *fortiori* it would be *ultra vires* if applied to persons who were neither erecting nor deemed to be erecting a building. Yet this is exactly the contention of the Public Prosecutor with regard to by-laws 37, 40 and 45. Notwithstanding the fact that the building by-laws in general only have relation to new buildings, yet it is argued that, by the peculiar wording of these by-laws, they can equally be applied to existing buildings. As Brett M.R. said in *Attorney General v. Horner*, 14 Q.B.D., page 257:—

> "It is a proper rule of construction not to construe an act of Parliament as interfering with or infringing persons' rights without compensation unless one is obliged so to construe it";

and the same principle applies to the construction of by-laws. I have no hesitation in deciding, therefore, that the by-laws in question are only intended to apply to the erection of buildings, and that if and so far as they are intended to apply to existing buildings they are *ultra vires*.

This does not mean that the Sanitary Board are left without any remedy where cubicles are without ventilation and dangerous to health. It is true that the Sanitary Boards Enactment contains no provision similar to section 236 of the Municipal Ordinance which particularly empowers the Commissioners, upon the certificate of the Health Officer that a building is unfit for human habitation, to give notice to the owner requiring him *inter alia* to do all or any of the following things, viz:—

> "the removal alteration or demolition of the whole or part of the partitions or other erections complained of",

but under section 77 (i) the Chairman of the Sanitary Board is required to take steps to abate nuisances, and 78 (a) enacts that:—

> "any building or part thereof of such a construction or in such a state is to be a nuisance or injurious or dangerous to health"

is a nuisance, liable to be dealt with summarily under the Enactment. It must of course be a question of evidence in each case whether or not a nuisance has been established. Because however there may be some such remedy, that does not justify the Sanitary Board in proceeding under by-laws which, in my opinion, have no application to the matter in dispute.

The appeal is, therefore, dismissed.

*Appeal Dismissed.*

---

[REVISIONAL CRIMINAL JURISDICTION]

RAJA MUSA, Ag. J.

November 5, 1938.

## PUBLIC PROSECUTOR v. UTAM SINGH.

(NEGRI SEMBILAN MISCELLANEOUS CRIMINAL APPLICATION No. 4 of 1938)

*Motor Vehicles (Construction and Use) Rules, 1937, Rules 56, 80—Road Traffic Enactment, Ss. 48, 118 (1) (d)—Interpretation & General Clauses Enactment (Cap. 1), S. 8 (iii)—charge of failing to maintain a motor vehicle in good working order—penalty—absence of specific power given to High Commissioner to prescribe—validity of rules.*

The accused was charged under Rule 56 of the Motor Vehicles (Construction and Use) Rules, 1937, with failing to maintain a motor vehicle in good and efficient working order, an offence punishable under Rule 80. Upon the accused pleading guilty, the Magistrate convicted and sentenced him to a fine of $75/-. The fine was paid. Being in doubt as to the legality of the proceedings, the Magistrate referred the matter to the Supreme Court under section 62 of the Courts Enactment (Cap. 2). The Supreme Court in exercise of its powers of supervision and revision under section 54 and not section 62 of the Courts Enactment heard the matter.

**Held,** that by virtue of section 48 of the Road Traffic Enactment and section 8 (iii) of the Interpretation and General Clauses Enactment (Cap. 1), Rule 56 is **intra vires** the Enactment, and that, notwithstanding the absence of specific power given to the High Commissioner to impose a penalty, Rule 80 is also **intra vires** the Enactment inasmuch as the Enactment by authorising the making of by-laws impliedly authorises the annexation of a reasonable penalty for their infringement.

CRIMINAL REVISION.

*Draper,* Deputy Public Prosecutor, for Public Prosecutor.

*Jeff,* for the Respondent.

*Cur. Adv. Vult.*

**Raja Musa, Ag. J.**—In this case one Utam Singh was summoned before the Magistrate on a charge of contravening rule 56 of the Motor Vehicles (Construction and Use) Rules, 1937, and punishable under rule 80. The summons was served on him with the usual intimation under section 118 (3) and (4) of the Road Traffic Enactment, 1937. He wrote a letter to the Magistrate pleading guilty to the charge and submitting himself to the order of the Court. When the case came on for hearing on the 28th September, 1938, the learned Magistrate accepted the plea contained in the letter of Utam Singh, convicted him and sentenced him to a fine of $75/-. This fine was paid.

The learned Magistrate then, or subsequently, entertained certain doubts as to the legality of the proceedings and referred the matter to the Supreme Court under the provisions of section 62 of the Courts Enactment (Chapter 2).

I agree with the learned Deputy Public Prosecutor in his submission that section 62 of the Courts Enactment can only be invoked before *sentence* and that when once sentence has been passed the trial is at an end and the Magistrate is *functus officio* and the section is no longer available. There is, however, no obstacle to the Court of a Judge, if it considers it expedient, exercising its powers of supervision and revision under section 54 of the same Enactment, and it is in exercise of the wide powers granted to me by that section that I decide to hear this matter.

I am indebted to the learned Magistrate for the very full reasons he has given in this matter which clearly indicate the time, pain and care he has devoted to the subject. I am also indebted to Mr. Jeff for certain useful and valuable observations that he addressed to me as *amicus curiae.*

Utam Singh was, as I have stated earlier, summoned on a charge of contravening rule 56 of the Motor Vehicles (Construction and Use) Rules, 1937, and punishable under rule 80.

These rules are divided into three parts. Part I. deals with definitions and exemptions; Part II. deals with the construction etc.; and Part III. with the use of motor vehicles. Rules 56 and 80 fall under Part III.

It is to be noted that in Part II. there is no penalty rule for a breach of those rules and rule 80 specifically provides a penalty for the breach of any rule in Part III.

The learned Magistrate summarised his difficulty by saying—

> "There appears, however, to be no such general power (i.e. the power to prescribe a penalty in the Rules) given to the High Commissioner in the local Road Traffic Enactment nor does it anywhere in the Enactment state that a breach of Part III. of the Motor Vehicles (Construction and Use) Rules is an offence."

The words in the first brackets are mine.

I will set out this paragraph in the form of two propositions, namely:—

> (i) It is nowhere specifically laid down in the Road Traffic Enactment that a breach of any rule in Part III. of the Motor Vehicles (Construction and Use) Rules, 1937, is an offence and
>
> (ii) The Enactment nowhere empowers the High Commissioner to impose a penalty for a breach of any rule in Part III. of the said rules and in the absence of such specific power rule 80 of the said rules is possibly **ultra vires** the Enactment.

Section 48 of the Road Traffic Enactment is couched in very wide terms. For the purposes of this case the relevant parts of the section are as follows:—

> "The High Commissioner may make rules.... and generally as to the use of motor vehicles ....and the conditions under which they may be used....and in particular but without prejudice to the generality of the foregoing provisions may make rules—
>
> (7) to specify....brakes on motor vehicles.... and to secure that....brakes....shall be efficient and kept in proper working order."

Rule 56 of which Utam Singh was charged with contravention reads:—

> "Every part of every braking system....shall at all times while the motor vehicle is used on a road be maintained in good and efficient working order and shall be properly maintained."

Bearing in mind section 48 of the Road Traffic Enactment and section 8 (iii) of the Interpretation and General Clauses Enactment (Chapter 1) there can be no doubt to my mind that rule 56 is *intra vires* the Enactment.

Coming now to the first proposition I have enunciated above the learned Magistrate has said—

> "A glance at section 118 (1) (d) of Enactment 17/1937 (the Road Traffic Enactment) might suggest that this (i.e. the fact that there is no power given to the High Commissioner to prescribe a penalty in the Rules and that it is nowhere laid down in the Enactment that a breach of Part III. of the Motor Vehicles (Construction and Use) Rules, 1937, is an offence) may be inferred but it is submitted that a careful study of its wording reveals that this is not so. The section states:—
>
> A person who—
>
> (d) without lawful excuse acts in contravention of or fails to comply with any provision of this Enactment or of any rule made thereunder;
>
> shall be liable where no special penalty is provided in the case of the first offence etc.
>
> In other words it refers only to that class of rule where no special penalty is provided and does not refer to rules in which a penalty is provided nor do I think can it be held to make a contravention of such rules an offence, even by implication."

With some of the remarks of the learned Magistrate on his construction of section 118 (1) (d) I respectfully agree but with others I do not.

To my mind section 118 (1) (d) does, in the clearest terms, two things. Firstly it creates an offence to contravene any provision of the Enactment or of any rule and secondly it provides a penalty for such an offence where no special penalty is provided.

It creates the offence because it says—

> "A person who—
>
> (d) ....acts in contravention of....any rule ....shall be liable...."

That, to my mind, means and can only mean that it is an offence to act in contravention of any rule.

It also provides a penalty for any offence where no special penalty is provided for that offence because of the words "where no special penalty is provided" contained in it. So that in this case if rule 80 is *intra vires* the penalty clause in this section will not apply.

I now come to the second proposition that the Enactment nowhere empowers the High Commissioner to impose a penalty for a breach of any rule contained in Part III. of the Motor Vehicles (Construction and Use) Rules, 1937, and in the absence of such specific power rule 80 thereof may possibly be *ultra vires*.

I hold that rule 80 is not *ultra vires* the Enactment on account of the absence of specific power given to the High Commissioner to impose a penalty because, on principle, an Act which authorises the making of by-laws impliedly authorises the annexation of a reasonable penalty for their infringement. In *Hall v. Nixon*, L.R. 10 Q.B. 152, Lush J. said at page 159:—

> "Mr. Herschell contended that there was no power to impose a penalty. But a by-law could only be enforced in this way. In 2 Kyd on Corporations, page 156, it is said: 'To secure obedience to a by-law, it is necessary that a penalty of some kind should be annexed to the breach of it, for otherwise the by-law will be nugatory....'
>
> ....but, by necessary implication, a power to make a by-law implies the power of enforcing it by pecuniary penalty."

For these reasons I think the conviction in this case is sound.

*Conviction Confirmed.*

---

[APPELLATE CIVIL JURISDICTION)

TERREL, Ag. C.J., McELWAINE, C.J. (S.S.)

AND GORDON-SMITH, J.

## SELVADURAY vs. CHINNIAH.

(SELANGOR CIVIL APPEAL No. 2 of 1938)

*Evidence Enactment Sections 102, 114—Onus of proof—Evidence evenly balanced—Onus not discharged —Failure to call material witness—when adverse presumption arises.*

At the conclusion of a trial the Judge was unable to say which story he could accept, as such evidence was evenly balanced. He found for the plaintiff on the ground that the defendant's failure to call a material witness who was at the time of the trial in India tilted the scales of probability.

**Held,** on appeal, that the onus was on the plaintiff to prove his case and that, the position at the conclusion of the trial being exactly even, the plaintiff had not discharged the onus which was on him and his action must fail.

**Held also,** that, the burden of proof not being on the defendant, his failure to call a material witness would not raise an adverse presumption under Section 114 of the Evidence Enactment.

CIVIL APPEAL.

*Shearn* for Appellant.

*Ramani* (*Sen* with him) for Respondent.

*Cur. Adv. Vult.*

**Terrell, Ag. C. J.**—The plaintiff (respondent) was a ledger clerk employed by the defendant, and his claim is for the sum of $926 for wages alleged to be due to him for the period of his service. Before Raja Musa J. the plaintiff recovered judgment for the amount claimed, and the defendant has appealed.